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February 19, 1999

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2/19/99

Vincent S. Oleszkiewicz, Esq.
Baker & McKenzie
One Prudential Plaza
30 E. Randolph Drive
Chicago, IL 60601

**Re: Lindsay Light II Site
Draft Right-of-Way Agreement**

Dear Vince:

Enclosed please find a copy of the City of Chicago's most recent draft of a "Right-of-Way Agreement" for the Lindsay Light II site. As we discussed in our earlier telephone conversation of this date, please note that the language in ¶11 is still very much in the preliminary draft stage.

Please contact me at 312-744-6904 to arrange a meeting to review and discuss these provisions.

Sincerely,

Mort P. Ames
Assistant Corporation Counsel

encl.

cc.: Naren Prasad, Chicago DOE
Mary Fulghum, USEPA



DRAFT

February 19, 1999 (2:52pm)

Site PIN _____

316 E. ILLINOIS STREET RIGHT-OF-WAY AGREEMENT

This Right-of-Way Agreement ("Agreement") is entered into this ____ day of _____, 1999 by and among River East, L.L.C. ("River East") and Kerr-McGee Chemical L.L.C. ("Kerr-McGee"), together referred to herein as the Potentially Responsible Parties ("PRPs"), and the City of Chicago ("City"), as follows:

1. This Agreement is not binding on the City until it is executed by a duly authorized representative of the City. Prior to its execution, this Agreement constitutes an offer by the PRPs. The duly authorized representatives of the PRPs have signed this Agreement, and this Agreement is binding upon them, their successors and assigns, upon execution by the City.
2. The PRPs stipulate:
 - a. The Site is located at 316 E. Illinois Street, Chicago, Illinois ("the Site"). River East is the current owner of the Site. The Site is, and has been for multiple decades, used as an asphalt-paved parking lot. The Site is bounded by Grand Avenue, McClurg Court, Illinois Street and Columbus Drive, and is legally described in Attachment ____.
 - b. On June 3, 1993, the United States Environmental Protection Agency ("USEPA") and the Illinois Department of Nuclear Safety ("IDNS") conducted a joint investigation at the Site and verified the presence of radioactivity below the asphalt surface of the Site at levels above natural background. USEPA determined that the use of the Site as a parking lot posed a negligible risk to the public.
 - c. A historical search determined that in the 1920s and 1930s a company known as the Lindsay Light Company leased the Site for the processing of thorium ores. Lindsay Light is a predecessor of Kerr-McGee. An ingredient in gas mantel manufacturing is thorium extracted from sand and formed into a solution into which mantels were dipped during the manufacturing process. It is believed that Section 11(e)(2) material, 42 U.S.C. §2014(e)(2) ("Thorium Residuals"), from this processing process is found at and around the Site.
 - d. On January 27, 1994, the Chicago Dock and Canal Trust ("Chicago Dock") (a predecessor to River East) entered into an Administrative Order by Consent

("AOC") with USEPA to investigate and study the extent of Thorium Residuals at the Site. The study was completed in May, 1994. A final report concerning the extent of contamination was delivered to USEPA on October 17, 1995, and the study was approved by USEPA on March 13, 1996. The final report concluded, inter alia, that there was twelve subsurface areas at the Site which exhibited elevated gamma radiation levels. The AOC is attached as Attachment ____.

- e. On June 6, 1996, the USEPA issued a Unilateral Administrative Order ("UAO") to Chicago Dock and Kerr-McGee directing that a removal action be conducted at the Site pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §9606(a). The UAO established criteria (the "Cleanup Criteria") for Thorium Residuals of 7.1 picoCuries per gram total radium - 5 picoCuries per gram total radium above background. The UAO is Attachment ____.
 - f. Pursuant to the UAO and with approval of USEPA, Chicago Dock and Kerr-McGee conducted and completed a removal action at the Site. This remediation took several months during CY1996 and 1997 and involved the removal and disposal of soils from the Site.
 - g. During the removal action, testing along Illinois Street and Columbus Drive revealed minor deposits of Thorium Residuals which could not be readily excavated. Information regarding the known location of this contamination was provided to the City during a meeting on June 26, 1997, and in subsequent correspondence dated July 14, 1997. Portions of Illinois Street and Columbus Drive, described on Attachment ____, are the subject of this Agreement.
 - h. Attached as Attachment ____ is a site map showing the area of the impacted soil in the right-of-way where, at the time of this Agreement, are located Thorium Residuals established by USEPA in the UAO. Also attached as Attachment ____ is a table showing the concentration of Thorium Residuals within the area described in Attachment _____. [NOTE: What is the status of groundwater contamination or potential contamination?]
- 3. The City stipulates that it holds the rights-of-way described in Attachment ____ in trust for the public and has jurisdiction over the rights-of-way.
 - 4. The parties stipulate that:
 - a. This Agreement is intended to meet the requirements of the United States Environmental Protection Agency regarding Thorium Residuals.

- b. This Agreement shall be recorded by the PRPs at their expense along with the USEPA's written approval of the Agreement with the Cook County Recorder of Deeds. Within thirty (30) days of such recording with the Cook County Recorder of Deeds, the Owner/Operator shall provide the City a copy of the Agreement and USEPA approval that has been stamped by the Cook County Recorder of Deeds to indicate that it has been recorded with that office.
 - c. This Agreement shall be null and void should the United States Environmental Protection Agency not approve it.
5. The City agrees that it will prohibit by ordinance the uses of groundwater that is contaminated by Thorium Residuals beneath portions of its rights-of-way identified in Attachment ____ as a potable or other domestic supply of water. **[Note: Groundwater issue]** This prohibition is ensured in Code Section 11-8-390. The City further agrees that it will limit access to soil as described herein under portions of the rights-of-way described in Attachment ____ that exceed USEPA Cleanup Criteria, as provided in Code Section 10-20-100, subject to the following conditions:
- a. Where the pavement in the right-of-way is to be considered an engineered barrier, the PRPs agree to reimburse the City for maintenance activities requested by the PRPs. The City does not agree to maintain the rights-of-way, nor does it guarantee that the rights-of-way will continue as a roadway or that the rights-of-way will always be maintained as an engineered barrier.
 - b. This agreement does not in any way limit the City's authority to construct, reconstruct, repair or maintain and operate rights-of-way upon the property identified in Attachment ____ or to allow others to use the rights-of-way. To that extent, the City reserves the right to identify, investigate, and remove soil and/or groundwater contaminated with Thorium Residuals above the Cleanup Criteria from the rights-of-way identified in Attachment ____ and to dispose of them as it deems appropriate in accordance with applicable environmental regulations so as to avoid causing a further release of the contaminants and to protect human health and the environment. The PRPs shall reimburse the actual costs incurred by the City or others in so identifying, investigating, removing, storing, handling or disposing of soil and/or groundwater contaminated with Thorium Residuals above the Cleanup Criteria, and it shall not be a defense for the PRPs that those costs were not consistent with or required by United States Environmental Protection Agency regulations, guidelines or policies. Prior to incurring any such costs, the City shall first give the PRPs thirty days, unless there is an urgent reason otherwise, to remove or dispose of soil and/or groundwater contaminated with Thorium Residuals above the Cleanup Criteria to the extent necessary for the City's work. Failure to give this opportunity to the PRPs shall not be a defense to a claim for reimbursement or that the work should not have been done. There is a

rebuttable presumption that and Thorium Residuals found in the portions of the rights-of-way described in Attachment ____ arose from the release of Thorium Residuals from the Site. Should the PRPs not reimburse the costs identified here, this Agreement shall be null and void in addition to such other remedies as may be available to the City by law.

6. The PRPs agree to indemnify and hold harmless the City, its agents and employees, and other entities using the rights-of-way by a permit issued by the City, for all obligations asserted against or costs incurred by them associated with the release of contaminants of concern as described in Attachments ____ and ____.
7. Violation of the terms of this Agreement by the PRPs, or their successor(s) in interest, may be grounds for voidance of this Agreement as a Right-of-Way Agreement.
8. No violation of a permit by a third party shall constitute a breach of this Agreement by the City. The PRPs also agree that their personnel, if any, at the Site will exercise due diligence in notifying those accessing contaminated soil in the rights-of-way of their rights and responsibilities under this Agreement.
9. Should the City breach this Agreement, the PRPs' sole remedy is for an action for damages in the Circuit Court of Cook County. Any and all claims for damages against the City, its agents, contractors, employees or its successors in interest or others under permit from the City arising at any time are limited to an aggregate maximum of \$20,000.00. No other breach by the City, its successors in interest or others under permit, of a provision of this Agreement is actionable in either law or equity by the PRPs against the City or them and the PRPs hereby release the City, its agents, contractors, employees and its successors in interest, or others under permit from the City for any cause of action it may have against them, other than as allowed in this paragraph, arising under this Agreement or environmental laws, regulations or common law governing contaminated soil or groundwater in the rights-of-way. Should the City convey, vacate or transfer jurisdiction of the rights-of-way, the PRPs may pursue an action under this Agreement against the successors in interest, other than the City, or any of its departments, or State agency, in a Court of Law.
10. This Agreement shall run with the land and be binding upon all assigns and successors in interest to the owner of the Site or the rights-of-way.
11. The City will limit access to the Site and rights-of-way as follows:
 - a. Normal Access: The City will limit access to the Site and rights-of-way via the City Department of Transportation ("CDOT"). Pursuant to §§ 10-20-100 and 10-20-150 of the Municipal Code of Chicago, a permit must be issued by CDOT to any party, including the City, requesting to perform subsurface work in a City

right-of-way. CDOT maintains and will maintain a permit database which, in conjunction with the City Department of Environment ("DOE"), tracks City rights-of-way with reported subsurface contamination. CDOT will consult the database whenever a party requests such a permit. If there is contamination reported in the right-of-way, the database will indicate this and instruct CDOT to direct the permit applicant to DOE to obtain detailed information on the nature and extent of the contamination. After the permit applicant consults with DOE, the applicant must complete a form where the applicant acknowledges that it is aware of the contamination, will take appropriate steps to ensure the health and safety of people working at the site and rights-of-way, and agrees to follow the health and safety plan for Thorium Residuals for this Site and adjacent rights-of-way ("Health and Safety Plan"), attached as Attachment ___, or other plan that provides equal or greater health and safety protections. **[Note: This is preliminary language.]**

- b. **Emergency Access:** The City Board of Underground ("BOU"), the City Department of Buildings, and the Chicago Fire Department will be notified of the contamination at this Site and adjacent rights-of-way and will be forwarded copies of all available environmental data regarding this Site and the adjacent rights-of-way, including the Health and Safety Plan. BOU will provide this information to all utilities in the area. In the event of an emergency that occurs outside of CDOT business hours, this will enable utilities to provide their personnel with the appropriate Site information to ensure that proper health and safety precautions are taken.
12. If any provision of this Agreement is determined to exceed the authority of the City, or if any provision of this Agreement is declared null and void or unenforceable by any court or tribunal having jurisdiction, then this Agreement shall be null and void.
13. This Agreement shall continue in effect from the date of the Agreement until the Thorium Residuals in the soil **[and groundwater?]** are subsequently reduced through active remediation or through natural attenuation to levels approved by USEPA, such that unrestricted access to the rights-of-way identified in Attachment ___ is demonstrated to be appropriate and there is no longer a need for this Agreement, and USEPA has, upon written request to the USEPA and notice to the City, provided a written determination authorizing unencumbered access to the rights-of-way.

**IN WITNESS WHEREOF, the City of Chicago has caused this Agreement to be signed by its
duly authorized representative:**

BY: _____

Date: _____

**IN WITNESS WHEREOF, River East, L.L.C. has caused this Agreement to be signed by its
duly authorized representative:**

BY: _____

Date: _____

**IN WITNESS WHEREOF, Kerr-McGee Chemical L.L.C. has caused this Agreement to be
signed by its duly authorized representative:**

BY: _____

Date: _____

Revised: February 19, 1999 (2:52pm)